(11)

No. 89-1448

MOTION FILED JUN 25 1990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

VIRGINIA BANKSHARES, INC., *et al.*,
Petitioners,

v.

DORIS I. SANDBERG, *et al.*,
Respondents.

FIRST AMERICAN BANKSHARES, INC., *et al.*,
Petitioners,

v.

PAUL H. WEINSTEIN, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN BANKERS ASSOCIATION, THE ASSOCIATION OF BANK HOLDING COMPANIES, AND ASSOCIATION OF RESERVE CITY BANKERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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June 25, 1990

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The American Bankers Association, the Association of Bank Holding Companies, and Association of Reserve City Bankers respectfully move, pursuant to Rule 37.3 of the Rules of this Court, for leave to file a brief as amici curiae in support of Petitioners. Counsel for Petitioners has granted consent to file this brief. Counsel for Respondents has been noncommittal to our request for consent.

The three sponsoring organizations jointly appeared as amici curiae in this case with leave of the Court

prior to the consideration of the petition for writ of certiorari. The American Bankers Association is the principal national trade association for commercial banks in the United States; the Association of Bank Holding Companies is the principal national trade association for bank holding companies in the United States; and the Association of Reserve City Bankers ("ARCB") is an association of the highest ranking officers of the major U.S. banking institutions. The ARCB monitors, identifies and analyzes issues relating to the economy and the financial system that will affect the business of banking. The ARCB sponsors research and analysis of issues of importance to banking and the nation's payment system.

The period of the late 1980's and early 1990's has been one of great and rapid change in the financial services industry. Increasing and differing forms of competition nationally and internationally, a new legal and regulatory environment, technology, and general economic conditions have collectively altered and continue to alter the shape of the banking industry. As bankers struggle to cope with future shock, questions as to how banks, bankers and bank holding companies may—or must—conduct such common transactions as mergers, acquisitions and buyouts assume an immense practical importance to the membership of the sponsoring organizations. There are serious issues raised by the "questions presented" upon which this Court has granted certiorari that pertain to the American corporate world generally. Those issues are fully discussed in the Brief of the Petitioner.

Your amici respectfully request the opportunity to supplement the Petitioner's analysis by describing the distinct nature of the highly regulated banking in-

dustry and the separate legislative and administrative regime under which that industry operates.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether Section 14(a) of the Securities Exchange Act of 1934 requires proxy statements not only to disclose material facts, but also to disclose alleged ulterior motivations of corporate directors and to characterize disclosed facts in a pejorative manner.

2. Whether a plaintiff may invoke an implied cause of action for damages under Section 14(a) of the Securities Exchange Act of 1934 when the allegedly misleading proxy statement could not possibly have affected the outcome of the proxy vote, and the plaintiff has not demonstrated causation in any other way. This is a question that the Court explicitly left open in *Mills v. Electric Auto-Life Co.*, 396 U.S. 375, 385 n.7 (1970).

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BRIEF OF THE AMERICAN BANKERS ASSOCIATION, THE ASSOCIATION OF BANK HOLDING COMPANIES, AND ASSOCIATION OF RESERVE CITY BANKERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE

The American Bankers Association, the Association of Bank Holding Companies, and the Association of Reserve City Bankers with leave of the Court hereby respectfully submit this Brief as Amici Curiae in order to urge the Court to reverse the decision of the United

States Court of Appeals for the Fourth Circuit below. The court, in that decision, affirmed district court money judgments in favor of minority shareholders who were dissatisfied with the valuation of the shares they owned in a bank when those shares were bought out in a merger transaction. The minority shareholders, Respondents here, had filed suit claiming that the proxy statements issued in connection with the proposed buyout were misleading and incomplete in several respects, in violation of Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(a). The Brief of the Petitioners in this case discusses at length the important federal securities law issues raised by the Fourth Circuit's decision. Your amici support the arguments advanced by the Petitioners, but have a somewhat different perspective which should not be overlooked as the Court considers this case.

As set forth in the preceding motion, the sponsoring organizations are principal national trade associations of the commercial banking industry in the United States. The American Bankers Association has, as its membership, commercial banks themselves, representing banks holding approximately ninety-five percent of domestic assets of all American banks. The Association of Bank Holding Companies has, as its members, holding companies which own or control commercial banks, and its member holding companies represent an estimated seventy percent of domestic assets of the commercial banking industry. The Association of Reserve City Bankers has, as its members, the highest ranking officers of the major U.S. banking institutions. The interests of all three are implicated in this case, since bank holding companies

and bank directors were all defendants in the case below and the transaction in issue involved the stock of a bank.

This latter fact is of critical importance here. This is not a case in which the nature of the subject corporation is an irrelevant consideration in determining the meaning and effect of a generally applicable law. Banks are regulated in a manner different from other businesses in a great many respects, and the laws which create the separate regulatory regime are enacted for public policy reasons different from (though not necessarily inconsistent with) the public policy reasons which lead to the enactment of otherwise generally applicable laws.

Your amici have distinct interest in seeing that this case is not decided here, as it was in the Fourth Circuit, with no appreciation of the special nature of banks or of the consequences which flow from that special nature.

SUMMARY OF THE ARGUMENT

In 1964, this Court concluded that there was, under certain circumstances, an implied private right of action for damages under Section 14(a) of the Securities Exchange Act of 1934. *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). Subsequent decisions of the Court have cast considerable doubt upon the continuing validity of *Borak*. Whether it is still valid or not, it is important to note that Congress amended the 1934 Act almost simultaneously with the decision in Borak. The amendment carved out an exception to the administration and enforcement of Section 14(a), vesting it in the hands of the federal bank regulatory agencies instead of the Securities and Exchange Com-

mission. Two years later, Congress strengthened the general ability and power of the bank regulatory agencies to enforce laws, regulations and safety and soundness standards against commercial banks through a detailed administrative process. Generally speaking, the federal judiciary is sometimes willing to find an "implied" private right of action where to do so would, in some fashion, further the obvious goals of the statute. It becomes increasingly difficult to find "implied" rights where private enforcement is not necessary to effectuate statutory goals and is, in fact, counterproductive of them. The goal of "investor protection" which motivated the enactment of the proxy solicitation statute may or may not be served by an implied private right of action to supplement Securities and Exchange Commission enforcement and administration of the law. But it is clear that Congress had a different and additional goal in mind—the goal of safety and soundness of insured depository institutions—when it gave bank regulatory authorities rather than the SEC jurisdiction over bank proxy statements. That latter goal is not furthered by an implied private right of action.

ARGUMENT

This is a class action lawsuit for damages by disappointed minority stockholders of a bank filed under Section 14(a) of the Securities Exchange Act of 1934. 15 U.S.C. 78n(a). Section 14(a) says nothing about whether stockholders or anyone else may sue for damages where it is alleged that the proxy rules promulgated under the authority of this section have been violated. Indeed, the Securities and Exchange Commission has general enforcement authority with re-

spect to its proxy rules. Nevertheless, this Court has held, in *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964), that there was an "implied" private right of action under Section 14(a). The Court acknowledged that the statute "makes no specific reference to a private right of action" (*Id.* at 432) but pointed out that the statutory language itself set forth that "among its chief purposes is 'the protection of investors', which certainly implies the availability of judicial relief where necessary to achieve that result." (*Id.*, quoting Section 14(a)). The Court went on to say that "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action." *Id.*

The *J. I. Case Co.* litigation involved a stockholder challenge to the merger of an ordinary Wisconsin business corporation with a tractor company. The *Virginia Bankshares* litigation now before the Court does not involve tractor companies; it involves banks. Because bank stock and the special regulatory considerations which pertain to banks are involved here, the *J. I. Case Co.* precedent should not apply.

Two months after the *J. I. Case Co.* decision was handed down, Congress enacted Section 12(i) of the Securities & Exchange Act, vesting the regulation of various bank securities matters in the hands of the appropriate federal banking regulatory agencies rather than the Securities and Exchange Commission. The change was part of a consistent pattern of exempting banks from the full import of the securities laws.[1]

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[1] When Congress has intended that certain aspects of the securities laws should apply to banks, it said so explicitly. *See, e.g.*, § 17c of the 1933 Act. 15 U.S.C. § 77q(c) making inapplicable for one purpose an exemption to which banks are otherwise entitled.

Section 3 of the Securities Act of 1933 provides that the Act does not apply (with limited exceptions) to "any security issued or guaranteed by any bank" 15 U.S.C. 77c(a)(2). It was not necessary for the Securities laws to apply to banks because they "are already under the control of Federal and state authorities" 77 Cong. Rec. 2939 (1933) (Statement of Congressman Mapes). Section 3 of the Securities Exchange Act of 1934 provides that banks are exempt from the various requirements the law makes applicable to brokers and dealers. 15 U.S.C. 78c(a)(4) and (5). *See also American Bankers Association v. Securities and Exchange Commission*, 804 F.2d 739 (1986). There are exemptions for banks from various provisions of the Investment Company Act of 1940, 15 U.S.C. 80a-2(a)(6), (11), 80a-3(c)(3), (11), and from the Investment Advisers Act of 1940, 15 U.S.C. 80b-2(a)(3), (7), (11).

Section 12(i), as enacted in 1964, was more than a cosmetic change or one merely allocating "turf" among federal agencies. It was enacted because Congress recognized and ratified the historic practice of enforcing laws relative to banks differently than with respect to other corporations. In Congressional hearings on the bill, the Comptroller of the Currency warned that disclosure obligations must be carefully formulated by bank regulators to avoid compromising the safety and soundness of banks. *Hearings on S. 1642 before a Subcomm. of the Senate Comm. on Banking and Currency*, 88th Cong., 1st Sess. 175-176 (1963). The Comptroller expressed particular concern over unconstrained private rights of action under proxy regulations applicable to banks, which regulators had disapproved in prior years (*id.* at 176-177):

> For this same reason it was decided not to rely upon private actions brought by shareholders for enforcement of our regulation. This is a concept which is foreign to bank regulation. We believe that it is clearly more effective and preferable for law enforcement to be accomplished directly by the responsible regulatory agency, rather than through private lawsuits with their uncertain effectiveness and their attendant risk of abuses, such as strike and nuisance actions.

The Federal Deposit Insurance Corporation likewise emphasized the need for special caution in regulating bank proxy solicitations, warning that "depositors' funds could be jeopardized by unlimited disclosure requirements . . . [T]herefore, the corporation has a major interest in assuring that disclosure requirements are consistent with the maintenance of depositors' confidence and the integrity of the deposit insurance fund." *Id.* at 225, 227. If legislation were enacted, the FDIC recommended, "the statute itself should specifically place the powers, functions and duties with respect to public disclosures in connection with bank securities issuers in the appropriate Federal banking supervisory authority, rather than in the Securities and Exchange Commission." *Id.* at 228.

Based on the concerns expressed by the Comptroller of the Currency and the FDIC, the law Congress enacted provides that the federal bank regulatory agencies shall have the "powers, functions and duties vested in the Commission to administer and enforce" Section 14(a) (among others) of the Securities Exchange Act, 15 U.S.C. § 78n(a), as it applies to proxy solicitations of federally regulated and insured banks. In conferring jurisdiction on the bank

regulators rather than the SEC, Congress sought to assure "full coordination with the safeguards provided by the Federal bank regulatory structure." S. Rep. No. 379, 88th Cong., 1st Sess. 31 (1963). It explained that disclosure laws must confer "great discretionary authority [upon] the administering agency to make appropriate rules, classifications, and exceptions. Under these provisions, the Federal bank regulatory agencies could adopt rules and forms different from those of the Commission." *Id.* at 36. Like the Comptroller of the Currency, Congress also expressed the belief that enforcement of the proxy rules must proceed with great caution. In particular, while the SEC had frequently resorted to litigation to deal with perceived infractions of its rules, Congress directed the banking agencies to proceed in a manner consistent with traditional supervisory policies: "it is likely that the relationship between the Federal bank regulatory agencies and the banks under their jurisdiction is such that it will rarely, if ever, be necessary for these agencies to resort to these remedies." *Ibid.*

The traditional supervisory policies had, since the Banking Act of 1933, included a high degree of administrative (i.e., non-judicial) enforcement. *See, e.g.*, Banking Act of 1933, ch. 89, 19-30, 48 Stat. 188-192. In 1966, the administrative enforcement powers of the banking regulatory agencies were increased considerably by enactment of the Financial Institutions Supervisory Act, 12 U.S.C. § 1818. It authorizes the agencies to serve a notice of changes upon a bank in the event that the bank is engaging or is about to engage in an unsafe or unsound practice or is violating or about to violate any law, rule or regulation. The agency may then conduct a cease and desist pro-

ceeding and, if appropriate, issue a cease and desist order. There are also provisions in the Act for temporary cease and desist orders, and for suspension and removal of bank officers, directors or employees. The law provides that cease and desist orders may compel affirmative action to correct conditions resulting from the unsafe and unsound practices or violations; any orders issued under the law are subject to judicial review, and are backed up by civil money penalties for violation of any such orders.

The manifest object of the 1966 Act was to preserve the safety and soundness of insured institutions. *Gulf Federal Savings & Loan v. FHLBB*, 651 F.2d 259, 262-264 (5th Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982).

> A Cease and Desist Order may be issued in two types of situations: when a bank is, has, or is about to engage in an unsafe or unsound practice or when a bank is, has, or is about to violate a law, rule, or regulation. . . . [B]oth situations are limited to practices with a reasonably direct effect on a bank's financial stability

First National Bank of Bellaire v. Comptroller of the Currency, 697 F.2d 674, 681 (5th Cir. 1983).

> Of course, it should be clear to all that the cease and desist powers and management removal powers are aimed specifically at actions impairing the safety or soundness of our insured financial institutions. These new flexible tools relate strictly to the insurance risk and to assure the public of sound banking facilities.

112 Cong. Rec. 23,998 (1966) (Statement of Cong. Patman).

The federal bank regulatory agencies have used their administrative powers to deal with precisely the same kind of transactions at issue in this case. This merger was subject to the review and prior approval of the FDIC under the Bank Merger Act, 12 U.S.C. § 1828(c). That Act specifically requires that the appropriate federal bank regulator take into consideration, among other things, the "managerial resources" of the existing and proposed institution. This provision often has been utilized by the bank regulatory agencies as a vehicle to assess the fairness of treatment of minority shareholders. *New Mexico Banquest Investors Corporation*, 69 Fed. Res. Bull. 877, fn. 5 (1983) and *First National Bancshares Newton Inc.*, 66 Fed. Res. Bull. 777, 778 (1980), (applying identical language in the Bank Holding Company Act.). Such federal bank regulatory provisions, therefore, provide for consideration of allegations such as those at issue here consistent with the existing bank regulatory scheme. As stated, this scheme establishes a system to address allegations of unfairness or misrepresentation in a process consistent with "the maintenance of a sound banking system and the prevention of failures. It is universally recognized that public confidence in the banking system is absolutely essential to achieve these ends."[2]

In sum, then, the federal bank regulatory agencies have the explicit statutory jurisdiction to promulgate and administer proxy rules pertaining to bank stocks; they have and use a more than adequate mechanism for the enforcement of those rules; and it was in-

[2] Mathewson, *From Confidential Supervision to Market Discipline: The Rule of Disclosure in the Regulation of Commercial Banks*, 22 Journal of Corp. Law 139, 158 (1986).

tended that in the administration and enforcement of those rules the agencies would take into account important public policy concerns other than and in addition to the public policy concerns applicable to other corporate stock transactions. Such "carefully integrated civil enforcement provisions . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 146 (1985).

This is not, therefore, a case like *J. I. Case Co.* where a "supplement" to Commission action is necessary. Indeed, courts have refused to imply private rights of action in cases like this one where private enforcement would be "disruptive of the legislative scheme considered as a whole."[3] Refusal to do so is especially warranted in the case of a complex regulatory scheme under which comprehensive remedial powers have been entrusted to expert agencies: "Implied rights of action may alter the remedial scheme devised by Congress for the enforcement of statutory programs and thus place the judiciary in the role of enunciating or modifying policy decisions properly the preserve of the legislature."[4] Judicial creation of a private right of action in such circumstances introduces new uncertainty into the regulatory scheme, undercuts the interest in consistent application of federal law, and increases the risk that the courts will substitute their judgment for that of the agency. *See*

[3] *Marx v. Centran Corp.*, 747 F.2d 1536, 1549-50 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) (Bank Holding Company Act).

[4] *United States v. FMC Corp.*, 717 F.2d 775, 780 (3d Cir. 1983).

Universities Research Association v. Coutu, 450 U.S. 754, 782-84 (1981).

This is an especially critical consideration in this case, since the open-ended nature of the liability to which the Fourth Circuit's decision exposes banks threatens the dissipation of bank capital the adequacy of which, this Court has recognized, forms the bulwark of bank safety. *Board of Governors v. First Lincolnwood Corporation*, 439 U.S. 234, 250 (1978).

J. I. Case Co. stands for the proposition that there is an implied private right of action for damages under Section 14(a) of the Securities Exchange Act. Even under its own facts, it is probable that it is no longer good law.[5] Insofar as it may be said to set forth any general principles for the analysis of when a private right should be implied and when not, it has clearly been superseded by this Court's decision

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[5] *See, e.g., Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979): ("To the extent that our analysis in today's decision differs from that of the Court in *Borak*, it suffices to say that in a series of cases since *Borak* we have adhered to a stricter standard for the implication of private causes of action, and we follow that stricter standard today."); *Carlson v. Green*, 446 U.S. 14, 39-40 n.5 (1980) (Rehnquist, J., dissenting) ("In light of this Court's recent decisions . . . it is clear that there is nothing left of the rationale of *Borak*"); *Cannon v. University of Chicago*, 441 U.S. 677, 735-36 (1979) (Powell, J., dissenting) ("I find [*Borak*] both unprecedented and incomprehensible as a matter of public policy. . . . [I]t constitutes a singular and, I believe, aberrant interpretation of a federal regulatory statute"); *Thompson v. Thompson*, 484 U.S. 174, 190 (1988) (Scalia, J., concurring in the judgment) ("This Court has long since abandoned its hospitable attitude towards implied rights of action. In the 23 years since . . . [*Borak*] we have twice narrowed the test for implying a private right"); *id.* at 188 (O'Connor, J., concurring) (same).

in *Cort v. Ash*, 422 U.S. 66, 78 (1975) in which a four-factor test was set forth.

(1) Is the plaintiff one of a class for whose especial benefit the statute was enacted? For the reasons set forth above, the answer in this case is clearly a negative. The plaintiffs here were owners of bank stock, and bank stock was explicitly carved out of the general applicability of Section 14(a) of the Act in 1964.

(2) Is there any indication of legislative intent to create or deny such a remedy? For the reasons set forth above, the answer in this case is clearly that the legislative intent was to deny such a remedy, simply by virtue of the creation of a comprehensive alternative means of enforcement of the law pertaining to bank stock.

(3) Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy? For the reasons set forth above, the answer in this case is clearly negative. The regulation of the nation's banks has been vested in expert regulatory agencies which, in turn, have been directed time and again to assure the safety and soundness of the institutions which deal in other people's money. Private plaintiffs and federal juries lack the expertise and the "safety and soundness" obligations necessary to carry out that Congressional goal. Where a private right of action is unnecessary or detrimental to the achievement of statutory goals, it will not be implied. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 39-40 and n. 26 (1977).

(4) Is the cause of action traditionally relegated to state law? The answer in this case is clearly affirmative, and in fact the plaintiffs here sought a state

law remedy for their complaints—and lost—prior to filing this federal action. See Pet. for Writ of Cert. at 5-6.

CONCLUSION

This Court's 1964 decision in *J. I. Case Co. v. Borak* does not, standing alone, dictate that there is a private right of action for damages in cases involving proxy statements surrounding a *bank* merger, even if *J. I. Case Co.* is still good law. Banks and bank stocks are treated differently other corporations and corporate stocks. Since the Fourth Circuit failed to recognize and respect that difference, its decision should be reversed by this Court.

Respectfully submitted,

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